You, Shipping E-brief & Ince, in any case

September 2022
# Table of contents

- Party offered reasonably satisfactory security following collision obliged to accept it 03
- Court finds Covid-19 restrictions did not constitute force majeure under MOA 07
- Navigating Precautionary Areas: cross carefully! 11
- Finance charters and events of default 15
- Court applies traditional good weather method for assessing vessel's performance 18
- Court finds extra-contractual counterclaims fell within scope of arbitration agreement 22
- Master acquitted of charges relating to seamanship and use of vessel 26
Party offered reasonably satisfactory security following collision obliged to accept it

*MV Pacific Pearl Co Ltd v. Osios David Shipping Inc (Panamax Alexander)* [2022] EWCA Civ 798
Party offered reasonably satisfactory security following collision obliged to accept it

*MV Pacific Pearl Co Ltd v. Osios David Shipping Inc (Panamax Alexander) [2022] EWCA Civ 798*

The Court of Appeal has confirmed that a party to ASG 2, the standard form Collision Jurisdiction Agreement, is obliged to accept reasonable security once it is offered and cannot choose to refuse that security and seek alternative or better security by arresting a ship. In such circumstances, there is no right to an arrest or any justification for it.

The standard forms

ASG 2 is a standard form Collision Jurisdiction Agreement produced by the Admiralty Solicitors Group. It provides for claims arising from a collision to be determined in the English Court in accordance with English law and for security for those claims to be given in order to avoid the costs and delays caused by an arrest.

Clause C of the standard form provides in relevant part:

“Each party will provide security in respect of the other’s claim in a form reasonably satisfactory to the other…”

Clause F provides for English law and exclusive English Court jurisdiction.

ASG 2 is intended to be used in conjunction with ASG 1, which is a draft Letter of Undertaking (LOU) to be given by the parties' respective P & I Clubs. It provides essentially that in consideration of the beneficiary of the LOU giving up the right to arrest in order to obtain security, the P & I Club agrees to pay whatever is agreed or determined to be due.

The background facts

On 15th July 2018, three vessels, *Panamax Alexander*, *Sakizaya Kalon* and *Osios David* collided in the Suez Canal. On 16 August 2018, the Owners of the *Panamax Alexander* and *Osios David*, following consultation with their respective P & I Clubs, entered into a bipartite Collision Jurisdiction Agreement (CJA) on the standard terms of ASG 2.

The CJA provided, among other things, that each party's claim would be determined exclusively by the English Court in accordance with English law and practice, and that each party would provide security in respect of the other's claim in a form reasonably satisfactory to the other. Discussions followed as to the amount and terms of the respective security to be provided by each party. While those discussions were continuing, on 5 September 2018, the Owners of the *Osios David* arrested the *Panamax Christina* in South Africa. *Panamax Christina* was owned by a company which *Osios David* alleged to be associated with the Owners of the *Panamax Alexander*. The Owners of the *Panamax Christina* are contesting that arrest in South Africa.

On 7 September 2018, the *Panamax Alexander*’s P & I Club proposed a draft LOU wording to the Owners of the *Osios David*. The LOU wording was based on ASG 1 but with the addition of a sanctions clause which was drafted in wide terms. The sanctions clause was included even though the *Panamax Alexander* was carrying a non-sanctionable barley cargo. This was because it had been on a voyage to Iran and in view of the US sanctions against Iran in place at the relevant time, it was deemed good practice by the International Group of P & I Clubs to have a belt and braces sanctions clause in their LOUs where there was an Iranian nexus. Among other concerns, the Clubs envisaged potential practical difficulties in making or receiving payment in such cases.

The Owners of the *Osios David* and their P & I Club would not accept this LOU wording and refused to lift the arrest in South Africa until another LOU, without a sanctions clause, was provided by the *Panamax Christina*’s P & I Club on 10 September 2018. This LOU was governed by South African law and jurisdiction.
The Owners of the *Panamax Alexander* subsequently commenced English Court proceedings, seeking damages for breach of the CJA, together with declaratory relief. The damages claimed consisted of fees payable by the Owners of the *Panamax Alexander* to the Owners of the *Panamax Christina* for providing security in the form of the Club LOU in South Africa, together with out-of-pocket expenses in relation to costs incurred by the Owners of the *Panamax Christina* in connection with the arrest in South Africa.

**The Admiralty Court decision**

The judge identified the two key issues of principle as follows:

whether the disputed LOU was in a reasonably satisfactory form (pursuant to Clause C of the CJA/ASG 2) notwithstanding the sanctions clause; and

whether, if it was in a reasonably satisfactory form to the Owners of the *Osios David*, they were contractually obliged by the CJA to accept it.

The judge found that, in principle, it was reasonable to include a sanctions clause in a Club LOU to be provided pursuant to Clause C of ASG 2. However, on the true construction of Clause C, he found that a party to whom reasonably satisfactory security was offered was not obliged to accept it and to refrain from seeking alternative security by way of a ship arrest. There was no express wording in Clause C to this effect and such a term could and should not be implied.

**The Court of Appeal decision**

The Court of Appeal allowed the appeal by the Owners of the *Panamax Alexander*, disagreeing with the judge’s construction of Clause C. On the Court of Appeal’s reading of the Clause, the security to be provided by each party would be the “security in respect of the other’s claim” and there was no room for seeking alternative security. If a party were free to seek alternative or better security, there would be no need to stipulate that the security to be provided under clause C should be “in a form reasonably satisfactory to the other”.

Furthermore, the combination of clauses C and F meant that if there was a dispute about whether the security provided was “in a form reasonably satisfactory to the other”, that dispute was to be determined not in the foreign court where a ship had been arrested (as would be the position absent the agreement), but exclusively in the English Court.

The Court of Appeal further stated that there was no right to arrest and no justification for an arrest once reasonable security had been provided and, if a ship had been arrested, it must be released.

The judge’s approach left a party which had been provided with reasonable security free to seek alternative or better security by arresting the ship (or a ship in associated ownership) in any jurisdiction in which it could be found, however unreasonable that might be and whatever the disruption to the ship’s trading or the cost, delay and inconvenience of getting the ship released. In the Court of Appeal’s view, this turned well established Admiralty practice on its head and was contrary to the clear purpose and the language of ASG 2.

The Court of Appeal also rejected the judge’s reasoning that there was nothing in ASG 2 about giving up the right to arrest. In fact, the whole scheme of the agreement was that its provisions operated instead of an arrest in order to found jurisdiction, to enable a claim to be served and to provide for security to be given.

The Court of Appeal added that, had it been necessary to imply a term that a party offered security in a reasonably satisfactory form would accept that security within a reasonable time, it would have done so. Such a term was necessary as a matter of business efficacy and because such a term was so obvious that it went without saying.
In conclusion, the Owners of the *Osios David* were obliged to accept the security offered and were in breach of the CJA for refusing to do so.

**Comment**

The Court of Appeal’s decision very usefully reflects what has always been understood to be a principal purpose of a CJA in the standard ASG 2 form, which is to avoid the unnecessary costs and delays associated with ship arrests in foreign jurisdictions where reasonably satisfactory security in the form of an LOU from a member of the International Group of P&I Clubs has been offered.

*Ince & Co acted for the Owners of the Panamax Alexander. The Owners of the Osios David will not be seeking leave to appeal to the Supreme Court.*
Court finds Covid-19 restrictions did not constitute force majeure under MOA

NKD Maritime Limited v. Bart Maritime (No 2) Inc (Shagang Giant) [2022] EWHC 1615 (Comm)
Court finds Covid-19 restrictions did not constitute force majeure under MOA

**NKD Maritime Limited v. Bart Maritime (No 2) Inc (Shagang Giant) [2022] EWHC 1615 (Comm)**

The Court has construed a force majeure clause and considered whether Buyers validly terminated a contract for the sale of a vessel on the basis that Covid-19 lockdown restrictions prevented Sellers from transferring title in the Vessel.

**The background facts**

Bart Maritime (No 2) Inc (“Sellers”) contracted to sell the VLOC Shagang Giant (“the Vessel”) to NKD Maritime Limited (“Buyers”) by way of a Memorandum of Agreement dated 5 March 2020 (the “MOA”). The Buyers were an intermediary specialising in acquiring tonnage for scrapping and/or recycling on behalf of a yard.

Scrap/recycling sales of vessels are self-evidently quite different to second-hand sales, and no standard form of contract has been widely adopted. Although not stated expressly in the judgment, the MOA was almost certainly made on a broker’s bespoke form.

The two relevant clauses under the MOA are –

**“2. Delivery**

**a. Delivery Location**

The Vessel shall be delivered and taken over safely afloat at outer anchorage Alang, West Coast India, which shall be the “Delivery Location”.

If, on the Vessel’s arrival, the Delivery Location is inaccessible for any reason whatsoever including but not limited to port congestion, the Vessel shall be delivered and taken over by the Buyer as near thereto as she may safely get at a safe and accessible berth or at anchorage which shall be designated by the Buyer, always provided that such berth or anchorage shall be subject to the approval of the Seller which shall not be unreasonably withheld. If the Buyer fails to nominate such place within 24 (twenty four) hours of arrival, the place at which it is customary for vessel (sic) to wait shall constitute the Delivery Location. The delivery of the Vessel according to this paragraph shall constitute full performance of the Seller’s obligations and all other terms and conditions of this Agreement shall apply as if delivery had taken place.”

Clause 10 of the MOA included a force majeure (“FM”) provision which provided –

“Should the Seller be unable to transfer title of the Vessel or should the Buyer be unable to accept transfer of the Vessel both in accordance with this contract due to …. restraint of governments …. then either the Buyer or the Seller may terminate this Agreement upon written or telegraphic notice from one party to the other without any liability upon either party and the Initial Payment referred to in Clause 1.b. hereof shall be released to the Buyer.”

As a result of Covid-19 restrictions at Alang, the Vessel was prevented from reaching the Delivery Location stipulated in the MOA. The Sellers asked the Buyers to nominate an alternate location for delivery, but the Buyers did not do so. The Buyers then sought to terminate the MOA relying on the FM clause.

The Buyers claimed that the Covid-19 restrictions imposed by the Indian Government constituted a “restraint of governments” and had precluded the Sellers from being able to transfer title in the Vessel in accordance with the MOA. This had meant that the necessary clearances could not be obtained so the Vessel had not reached the Delivery Location. Consequently, NOR could not be tendered, and no transfer of title in accordance with the MOA was possible. The Buyers were, therefore, entitled to terminate under clause 10 of the MOA and were entitled to the return of the deposit.
The Sellers contended that clause 10 of the MOA was not applicable. The Sellers had not been unable to transfer title in accordance with the MOA. Transfer of title did not require 'delivery' of the Vessel. In any event, even if delivery was a necessary feature of transfer of title, the Sellers had not been unable to deliver the Vessel by reason of the FM event, namely restraint of governments. The Vessel had arrived at the Delivery Location, or as near thereto as she could safely get. The position where she had anchored was thus deemed to be the Delivery Location, and her delivery there constituted full performance of the Sellers’ obligations under the MOA.

The Commercial Court decision

Construction of clause 10 and meaning of “transfer of title”

The Court considered the construction of clause 10 of the MOA and concluded that 'delivery' was not a necessary requirement of 'transfer of title'. The phrases “delivery” and “transfer of title” are both used in the MOA and are not synonymous. Clause 10 conspicuously did not refer to 'delivery' but had deliberately used the term “transfer title of the Vessel.”

'Transfer of title’ only requires payment of the price, delivery of the Bill of Sale, and deletion from the relevant ships’ register. There was no condition precedent to transfer of title that there should be a Protocol of Delivery and Acceptance and physical delivery.

The FM provision at clause 10 could not, therefore, be invoked where transfer of title was possible.

Was there delivery under the contract at the required location?

The place at which the Vessel anchored was not “outer anchorage Alang.” The Vessel was, therefore, not at the Delivery Location under the MOA. The question then was whether there had been a substituted Delivery Location under clause 2(a).

The Court held that the Vessel was required to get as near to the Delivery Location specified as was possible, given the matter which rendered that Delivery Location inaccessible. The Vessel had got as close to Alang outer anchorage as she could, subject to the fact that she did not have permission to come within the VTS Khambat area, which rendered the Delivery Location inaccessible.

The Sellers had fulfilled their obligations to deliver the Vessel in accordance with the MOA and the Buyers could not rely on the FM provision.

Did the circumstances constitute “restraint of governments” under the FM clause?

The reason the Vessel had not obtained permission to proceed to Alang outer anchorage, and could not have been boarded by officials, was attributable to Covid 19 restrictions. These can be described as a “restraint of governments”. The key issue was then whether that position rendered the Sellers ‘unable’ to transfer title?

‘Inability’ is significantly different from hindrance or delay. Whether there is ‘inability’ to perform for the purposes of clause 10 by reason of a temporary restraint of governments depends on whether the probable period of that restraint will materially undermine the commercial adventure. In assessing this, the Court indicated that similar considerations would apply as those which apply when considering whether a contract is frustrated.

On the facts, the Court did not consider that the delay constituted an ‘inability’ on the part of the Sellers to perform the MOA for the purposes of clause 10. The Vessel was being sold for demolition and not for trading, and some delays to the beaching of the Vessel were inevitable given her size. Nor did the temporary nature of the particular Covid-19 restrictions materially undermine the commercial adventure.
The Buyers were held to have wrongfully terminated the MOA. The Sellers were entitled to retain the deposit of US$4.2 million but were not entitled to further damages as the deposit more than adequately compensated them for their losses.

Comment

This case acts as a useful reminder that a party’s ability to rely on FM provisions will depend on the particular wording and construction of the clause and on the application of the specific facts.

The judgment also contains useful guidance on the construction of similarly worded FM clauses and, in the context of the construction of MOAs, it also offers guidance on the distinction between “delivery” and “transfer of title.” This is particularly useful in the context of scrap sales, where sellers can face problems (and demands for renegotiation) as a result of attempting delivery in accordance with unexpected local rules and practices in the end-buyers’ home port.

Finally, the decision confirms that Covid-19 restrictions did constitute “restraint of governments” which is a common wording in FM and exception clauses. However, Covid-19 restrictions will not automatically excuse a party from performance, especially where Covid-19 delays are only temporary in nature and do not materially undermine the commercial adventure.
Navigating Precautionary Areas: cross carefully!

Wilforce LLC and Awilco LNG AS v. Ratu Shipping Co SA and Sea Queen Shipping Corporation (Wilforce v. Western Moscow) [2022] EWHC 1190 (Admlty)
Navigating Precautionary Areas: cross carefully!

*Wilforce LLC and Awilco LNG AS v. Ratu Shipping Co SA and Sea Queen Shipping Corporation (Wilforce v. Western Moscow) [2022] EWHC 1190 (Admlty)*

The Admiralty Court has recently handed down judgment in the case of the collision between the LNG carrier *Wilforce* and the bulk carrier *Western Moscow* which took place in the Singapore Straits in May 2019. This case is notably the first collision case to come before the Admiralty Court since the Supreme Court handed down its judgment in the *Ever Smart* collision case. It is also the first case in which the Court has had to consider responsibility for a collision in a Precautionary Area.

The background facts

The collision occurred in a Precautionary Area of the Singapore Straits Traffic Separation Scheme (TSS). These areas are defined by an IMO Resolution as an “area within defined limits where ships must navigate with particular caution and within which the direction of traffic flow may be recommended”. In this case, the Precautionary Area represented an area where vessels may cross the TSS from north to south or south to north. Local navigational rules provided that vessels should be in a maximum state of manoeuvring readiness in this area and vessels are to navigate in an anti-clockwise direction.

*Wilforce* was leaving Singapore by proceeding eastwards in the TSS. *Western Moscow* was also leaving Singapore but intending to proceed westwards in the TSS. She had intended to join the westbound lane of the TSS at the western end of the Precautionary Area but, to avoid a tug and tow crossing the Precautionary Area southwards, instead entered the Precautionary Area at the eastern end and proceeded south. The vessels’ courses from around C-10 can be seen on the plot below (*Wilforce* denoted in blue and *Western Moscow* in orange). At around C-10, the *Western Moscow* crossed the Precautionary Area ahead of *Wilforce* in a southwards direction. She then proceeded to turn to port on a westerly heading, intending to join the westbound lane. The port bow of *Western Moscow* struck the port side of *Wilforce*. It is said that the combined claims for damage amount to around £14 million.

Vessels’ faults

*Western Moscow*

Although the radar echo of *Wilforce* was observed at about C-6, the lookout on *Western Moscow* was found to be very poor. This poor lookout resulted in a failure to apply starboard helm at C-3 and the need to correct an order of hard port to hard starboard in the last two minutes before the collision.

It further meant that *Western Moscow* failed to adopt a course where she would join the westbound traffic lane at as shallow an angle as possible and instead continued to turn to port, such that she found herself heading in a westerly direction in that part of the Precautionary Area where there might be vessels proceeding in an easterly direction.

The failures on the part of *Western Moscow* (i) in exhibiting additional, non-navigational lights; and (ii) not sounding two short blasts (indicating a turn to port) were not held to be causative. Furthermore, *Western Moscow*’s use of VHF in concluding an agreement for a port to port passing was not to be criticised.
Wilforce

Whilst criticisms were made of the lookout on Wilforce, none was found to have been causative. However, her speed approaching the Precautionary Area was criticised as had she been in a maximum state of manoeuvring readiness, she would have been able to reduce speed more quickly.

The Admiralty Court decision

A crossing case?

This was the first collision case to be determined following the Supreme Court’s decision in Ever Smart.

Western Moscow interests argued that the crossing rules (rules 15 – 17 of the COLREGs) applied to the vessels’ encounter. If they did, Wilforce, as the give way vessel, was to take early and substantial action to keep out of the way and Western Moscow was to keep her course and speed (which would then give rise to the question of what ‘course’ the porting Western Moscow was obliged to ‘keep’).

On the facts of this case, the Judge held that it was not necessary for him to decide whether or not the crossing rules applied. Instead, the encounter was governed by the requirements of good seamanship. On the advice of the Nautical Assessors, the action required of both vessels was the same as that which was required if the crossing rule did not apply: Wilforce as the give-way vessel should have reduced speed by C-5 (which she failed to do) and turned to starboard when the tug and tow permitted (which she did). Western Moscow should have steadied on a course of 350 degrees at C-7.

However, it was argued that in circumstances where Western Moscow was said to have created the crossing situation herself, Western Moscow would not in any event be entitled to invoke the crossing rule. Previous authority suggested that a putative stand-on vessel cannot claim ‘stand-on’ status when that vessel has created the crossing situation by her own fault. The Judge expressed some hesitancy in reconciling these past authorities with the recent Supreme Court crossing case of the Ever Smart, where it was suggested that the crossing rules should only be dis-applied if there is some necessity to do so. Although there was discussion of the various authorities, the Judge considered it preferable to deal with this question when its resolution actually matters.

As to the course that Western Moscow should have kept had the crossing rules applied and following the Supreme Court’s decision in Ever Smart, it was accepted that her duty to keep course and speed should be moulded to comply with the IMO resolution as to how vessels should navigate in a Precautionary Area. That is to say that she should not have maintained her port turn.

Apportionment of liability

Apportionment of responsibility for a collision depends upon an assessment of the (i) blameworthiness/culpability; and (ii) causative potency (i.e. the contribution which each vessel made to the fact that a collision occurred) of both vessels.

Although Wilforce’s excessive speed contributed to the damage caused by the collision and was a breach of an important obligation, both the causative potency and blameworthiness of Western Moscow was found to be greater than that of Wilforce. Her poor lookout meant that she not only continued to turn to port, but also delayed in applying hard starboard helm. This poor lookout was also particularly blameworthy given her navigation in a Precautionary Area.

The Judge held that Western Moscow’s fault was three times the fault of Wilforce. Liability was, therefore, apportioned 75% to Western Moscow and 25% to Wilforce.
Comment

Collision cases do not come to Court frequently and so it is interesting that the Court has had to consider and examine the Supreme Court’s ruling so soon. It does, however, highlight the difficulty that the Judge faced in reconciling the Supreme Court judgment with previous authority. The matter of whether a stand on vessel who has created a crossing situation by her own fault can invoke the crossing rules will, therefore, be for another day. However, it remains the case that the crossing rules should be applied wherever possible and, in the absence of an express stipulation, should not be overridden unless there is compelling reason to do so.

Sophie Henniker-Major
Managing Associate, London
T. +44 (0) 20 7481 0010
SophieHennikerMajor@incegd.com

Martin Dalby
Partner, London
T. +44 (0) 20 7481 0010
MartinDalby@incegd.com
Finance charters and events of default

OCM Maritime Nile LLC & Anor v. Courage Shipping Co Ltd & Others (Courage and Amethyst) [2022] EWCA Civ 1091
Finance charters and events of default

OCM Maritime Nile LLC & Anor v. Courage Shipping Co Ltd & Others (Courage and Amethyst) [2022] EWCA Civ 1091

This case concerned an alleged Event of Default under a finance bareboat charter and owners’ rights to terminate and raised issues of general importance under bareboat charters.

We have previously reported on the Commercial Court judgment here:


The Court of Appeal has now confirmed that decision and dismissed the bareboat charterers’ appeal on all grounds.

The Commercial Court decision

At first instance, the judge decided that Owners were entitled to terminate the charters and repossess two vessels after the US had designated the Charterers’ beneficial owner as a global terrorist. The contracts provided that such designation would constitute an ‘Event of Default’.

The judge rejected the Charterers’ arguments that: 1) On a proper construction of the charter, the Owners were not entitled to the right to repossess (the “Construction Defence”); and 2) that the claim for rerepossession relied on provisions which were penal and therefore void and unenforceable (the “Penalty Defence”).

The judge further rejected the Charterers’ claim for equitable relief against forfeiture to either restore the charters or grant restitutionary relief in respect of payments already made to Owners. He did so on the basis that: 1) the Charterers’ misconduct before and during the proceedings precluded them from such relief; and 2) the evidence did not establish that such relief would have been appropriate as Charterers’ evidence was insufficient to establish that termination would create such a ‘windfall’ as to make it unjust to allow rerepossession. Further, the Court considered that the risk of placing the Owners in breach of sanctions given the designation was itself sufficient to refuse relief. As we commented before, the Construction Defence depended on the precise wording of the contract but the other arguments raise points of far wider importance.

The Court of Appeal decision

On appeal, the Charterers accepted that an ‘Event of Default’ had occurred, but maintained their Construction Defence. The Court of Appeal upheld the judge’s reasoning. This defence turned on the interpretation of bespoke clauses.

Charterers did not appeal the Penalty decision or challenge the judge’s conclusions that there was little prospect of the US Office of Foreign Assets Control (OFAC) granting a licence to permit continued performance of the charterparties. However, they maintained their position that, in this instance, the Court should exercise its discretion to grant equitable relief given the “colossal windfall” which would accrue to the Owners if they were permitted to repossess the vessels and the adverse consequences the Charterers would face if they lost their funds which they had invested as advances towards the vessels’ purchase prices.

The Court of Appeal concluded that “… the judge’s rejection of the charterers’ dishonest case that Mr Mallah had ceased to be associated with them is fatal to the claim for relief…” and that the Charterers had “no answer” to the problem that, as the judge had concluded: 1) it was impossible for the charterparties to be performed lawfully given Mr Mallah’s designation; and 2) there was little prospect of OFAC granting the required licences.
The Court considered that the judge was right to conclude that “this was not a case in which relief against forfeiture was appropriate, for the decisive reasons which he gave”, and that, moreover, the submission that repossession would afford the Owners a “colossal windfall” ran counter to the judge’s findings of fact in relation to what the true value may be concerning one of the vessels, and doubt in relation to the other. The Court of Appeal agreed with the judge that, in the circumstances, it was unnecessary to resolve the ‘windfall’ point, and also considered it unnecessary to say anything further as to whether the Charterers’ misconduct itself debarred them from seeking the relief they sought.

Comment

This case is important as bareboat charters are common “sale and leaseback” transactions. It demonstrates that although equitable relief against forfeiture may in principle be available, the remedy remains discretionary. The Court will look at the circumstances as a whole, and consider whether the applicant’s conduct may debar it from being granted relief, and whether in fact the remedy would be appropriate. These factors will likely be highly fact sensitive, and we would recommend seeking legal advice at an early stage. It is clear from the decision, for example, that cogent evidence of the adverse consequences of termination needs to be provided if equitable relief is to be sought.
Court applies traditional good weather method for assessing vessel’s performance

*Eastern Pacific Chartering Inc v. Pola Maritime Ltd (Divinegate) [2022] EWHC 2095 (Comm)*
Court applies traditional good weather method for assessing vessel’s performance

*Eastern Pacific Chartering Inc v. Pola Maritime Ltd (Divinegate) [2022] EWHC 2095 (Comm)*

The Court has recently dismissed a claim for wrongful arrest in an underperformance dispute and also given helpful guidance as to how speed and performance cases are to be approached.

The background facts

The defendant Charterers chartered the *Divinegate* from the claimant Owners for the carriage of pig iron from Latvia to New Orleans in October/November 2019. Charterers ordered the Vessel to proceed at eco-speed on the laden voyage. Following completion of discharge, considerable marine growth was observed on the Vessel’s hull and Charterers claimed that the Vessel’s performance was significantly affected, either due to hull fouling or Owners’ breach of their clause 8 (utmost despatch) obligations. Charterers sent a letter before action and did not pay the outstanding hire.

On 1 July 2020, Owners arrested the *Pola Devora* in Gibraltar to secure their claim. In support of the arrest, they relied on a publicly available Lloyd’s List Report which listed the beneficial owner of the *Pola Devora* as the defendant Charterers since 5 July 2019, with the registered owner being a Russian entity called Pola Rise LLC, also from that date. Prior to that, the registered and beneficial owners were listed as being GTLK Five Limited, Malta and PJSC State Transport Leasing Company (GTLK) respectively. Charterers contended that the arrest was unlawful because GTLK Malta held both legal and beneficial ownership of the Vessel at the date of the arrest and they produced a Seaweb report in support. On 6 July 2020, further documents were provided evidencing the fact that the *Pola Devora* was not owned by Charterers, following which the arrest was lifted and a Club LOU was put up as security for Owners’ claim.

Owners claimed for outstanding hire, bunkers and other expenses totalling nearly US$ 100,000. Charterers in turn sought deductions from hire and also claimed damages for breach of charter regarding the Vessel’s performance. A separate counterclaim was advanced for over US$ 70,000 in damages concerning Owners’ alleged wrongful arrest of the *Pola Devora*.

The Commercial Court decision

Speed and performance claim

Charterers contended that the Master’s failure to proceed at eco-speed amounted to a breach of (i) clause 15 (off-hire) as a default of the Master; or (ii) the clause 8 obligation to proceed with utmost despatch; or (iii) clause 1 to provide a vessel in every way fit for service; or (iv) the performance warranty.

The performance warranty contained in the fixture recap provided as follows (emphasis added):

“SPEED AND CONSUMPTION BASIS NO ADVERSE CURRENTS AND VALID UP TO AND INCLUDING DOUGLAS SEA STATE 3 / BEAUFORT FORCE 4

BALLAST: ABT 14KT ON ABT 20.5MT IFO + 0.1 MDO LADEN: ABT 14KT ON ABT 25MT IFO + 0.1 MDO... ’ABOUT’ SHALL MEAN AN ALLOWANCE OF PLUS/MINUS 0.5 KNOTS FOR SPEED AND PLUS/MINUS 5 PER CENT FOR FUEL OIL/DIESEL OIL CONSUMPTION...

THE DESCRIPTION OF THE VESSEL’S SPEED APPLIES IN WEATHER CONDITIONS NOT EXCEEDING FORCE 4 ON THE BEAUFORT SCALE OR DOUGLAS SEA STATE 3, WITH THE VESSEL LADEN UNDERDECK TO HER SUMMER SALTWATER LOADLINE. ALL DETAILS ABOUT ECO CONSUMPTIONS ON ABT BSS AND: BALLAST: ABT 13.0KT ON ABT 16.0MT IFO + 0.1 MDO LADEN: ABT 13.0KT ON ABT 20.5MT IFO + 0.1 MDO BALLAST: ABT 12.5KT ON ABT 14.5MT IFO + 0.1 MDO LADEN: ABT 12.5KT ON ABT 19.0MT IFO + 0.1 MDO ALL DETAILS ABOUT”
The parties differed on the appropriate method to be employed in assessing the Vessel’s performance. Owners contended that performance should be assessed conventionally, as per *The Didymi*, i.e. by reference to the Vessel’s speed during good weather. This speed is then extrapolated against the entire laden voyage, since if she underperformed in good weather she will do so in bad weather too. On the facts, there was no good weather period on the laden voyage to serve as the basis for a reliable assessment of the Vessel’s ability to meet the warranted performance.

Charterers, however, argued that the good weather method is inherently imprecise and suggested instead that underperformance could be established by reference to the Vessel’s measured RPM (revolutions per minute) which reflect the engine speed maintained by the crew. On the basis that the main engine was operated at 92 RPM or lower throughout the laden voyage, there was a breach of clause 8 irrespective of whether there were any good weather days against which to test the Vessel’s performance.

The Court preferred the “good weather” method put forward by Owners, suggesting that this method accurately reflected underperformance, including where the Master had unjustifiably not applied sufficient engine speed in breach of clause 8. In these circumstances, however, Charterers’ claim for time lost solely due to hull fouling would represent a double recovery (as underperformance by reason of hull fouling was contemplated by this method) and so was rejected.

On the facts of this case, the RPM method employed was found not to be reliable in identifying loss of time: it made incorrect assumptions as to the resistance on the hull and made no allowances for weather conditions being a reason for a reduction in engine speed, as well as ignoring the fact that there were some periods where the Vessel did achieve the warranted speed.

In applying the “good weather” method, the Court held that the Vessel had failed to meet the warranted speed of 12.5 knots in good weather and so there was underperformance giving rise to a loss of time of 16 hours. As such, Owners had failed to proceed with utmost despatch. Evidence from the Vessel’s logbook suggested that the engine had been operated at a lower speed to maintain her consumption below the charterparty warranty rather than in response to weather conditions and the weather conditions relied on by Owners were not sufficient to justify this lower speed.

Wrongful arrest

On the evidence, the Court found that Charterers were not the beneficial owners of *The Pola Devora* at the time of the arrest.

The test for wrongful arrest, as established in *The Evangelismos*, is that the arrest proceedings were commenced or continued in bad faith or with such gross negligence as implies malice. Owners’ conduct in making and maintaining the arrest was not in bad faith nor grossly negligent. There was a lack of clarity in the public documents surrounding the ownership of *The Pola Devora* and it would not have been obvious to Owners that the beneficial ownership of that ship was GTLK Malta, particularly in circumstances where Charterers were named on some public documents as beneficial owner. The Court concluded that Owners’ arrest based on the Lloyd’s List Report was a genuine but understandable mistake.

Further, Owners’ conduct after the arrest did not amount to any inference of malice. Although the ownership position was not resolved until the registration documents and charterparties for *The Pola Devora* were produced, Owners’ representatives acted reasonably in not recommending the release of *The Pola Devora* without exploring adequate security or payment into escrow.
Comment

Speed and performance claims commonly arise and will be familiar to shipowners, charterers and their Clubs. As this case demonstrates, they are frequently disputed due to differing ways in which weather, performance and consumption can be assessed, as well as the methodologies to be adopted. In this regard, the Court has given some helpful guidance as to how performance warranties should be approached and applied. Specifically:

The wording of the charter should be applied as this should reflect the parties’ desire to achieve certainty and a commercial solution if speed and performance issues arise;

The Court will adopt an approach which reflects commercial practice in assessing performance and the specific wording agreed by the parties, rather than imposing legal methodologies;

The “good weather” warranty tests against a ship’s actual performance at sea during the charterparty, rather than adopting a paper calculation of the engine’s capability. If a Master maximises the weather or currents (or fails to do so) then this is part of the vessel’s capability as much as the capability of its engine or the condition of the hull during any period of review;

The “good weather” method is conventional, but is not the only available methodology for making a claim for underperformance and does not bar alternative methods being used to claim compensation. However, where a charter contains a performance warranty, it is suggested the “good weather” method should be applied as it reflects the chosen benchmark for performance;

Any alternative method must be consistent with the express wording of the performance warranty contained in the charter; and

The “NO ADVERSE CURRENTS” wording in this charter suggests that any time spent sailing with adverse currents is not to be treated as good weather but time spent sailing with a positive current would be counted. If positive currents are to be deducted from an assessment against the performance warranty, they should be expressly excluded.

As to the arrest, assessing the true beneficial ownership of a ship is not always straightforward and it is not unusual for there to be a lack of clarity or errors in the information in the public domain. So long as the evidence and circumstances have been relied upon with an honest belief such that bad faith cannot be established, a party will not be found to have arrested a vessel unlawfully.

Peter McNamee
Partner, London
T. +44 (0) 20 7481 0010
Peter.McNamee@incegd.com

Sophie Henniker-Major
Managing Associate, London
T. +44 (0) 20 7481 0010
Sophie.Henniker-Major@incegd.com
Court finds extra-contractual counterclaims fell within scope of arbitration agreement

*Sea Master Special Maritime Enterprise & another v. Arab Bank (Switzerland) Ltd (Sea Master) [2022] EWHC 1953 (Comm)*
Court finds extra-contractual counterclaims fell within scope of arbitration agreement

Sea Master Special Maritime Enterprise & another v. Arab Bank (Switzerland) Ltd (Sea Master) [2022] EWHC 1953 (Comm)

This bill of lading dispute raised issues as to whether the Bank financing the purchase of a cargo, and the holder of a switch bill of lading for the cargo, was a party to the arbitration agreement incorporated into the switch bill and, if so, whether certain counterclaims brought by the Owners came within the scope of that arbitration agreement.

The background facts

On 25 April 2016, the claimant Owners chartered the vessel on the Norgrain 1989 form for a voyage carrying grains from Argentina to Morocco. The defendant Bank financed the purchase of the cargoes. In June 2016, three parcels of cargo – corn, soya bean meal and soya bean hulls - were loaded on board the vessel. 30 bills of lading in the Congenbill 2007 form were issued, all incorporating the English law and London arbitration clause in the charterparty.

The corn and soya hull pellets were discharged in Morocco without production of the original bills, leading to a misdelivery claim by the Bank. The original sale of the soya bean meal cargo fell through and a switch bill was issued in September 2016 for carriage to Algeria instead of Morocco. A second switch bill was subsequently issued in November 2016 for carriage to Lebanon. The cargo was ultimately discharged in February 2017 in Tripoli, Lebanon, having remained on board much longer than anticipated.

The Bank brought a misdelivery claim in arbitration and also commenced proceedings in Connecticut in order to arrest the vessel and obtain security for its claim. The Charterers were insolvent by this stage, so the Owners sought to bring counterclaims against the Bank for demurrage and damages for detention, as well as for reasonable remuneration and quantum meruit.

The awards and Court order

First Award

The tribunal found that it did not have jurisdiction over the counterclaims for demurrage and damages for detention because the Bank was not an original party to the switch bill. It also rejected the argument that the Bank was a holder of the soya bean meal bills from September 2016 which demanded delivery and made a claim under the contract of carriage so as to become liable under the contract pursuant to s.3(1) of the Carriage of Goods by Sea Act 1992 (1992 Act). The tribunal added that the claims for reasonable remuneration and quantum meruit would have failed on the merits.

Having decided that the Bank was not a party to the switch bill, the tribunal did not need to decide whether the Bank was bound by the arbitration agreement.

Court order

The Owners challenged the First Award in Court, contending that the Bank was in fact an original party to the switch bill and therefore bound by the arbitration agreement. The judge decided the matter on a different basis to that argued, finding that the Bank's admitted acquisition of rights of suit under the switch bill (under s.2 of the 1992 Act by virtue of becoming holder) meant that it was bound by the arbitration agreement in the switch bill.
Second Final Award

It was no longer in issue that both the Owners and the Bank were parties to the arbitration agreement in the switch bill. However, there remained outstanding the issue of whether the Owners were bound by the tribunal's decision in the First Award that the Bank was not an original party to the switch bill. The tribunal decided there was no issue estoppel as to whether the Bank was a party to the switch bill or otherwise owed substantive obligations under the bill.

Third Award

The tribunal found against the Owners in respect of the counterclaims for demurrage and damages for detention, accepting the Bank's argument that only the Charterers could be liable in respect of delay in discharge and the prolonged period of storage afloat. An appeal against this decision was dismissed.

Fourth Partial Final Award

The tribunal dismissed the Bank’s misdelivery claim, finding that the Bank had not proved its loss. It also formally dismissed the reasonable remuneration and quantum meruit counterclaims.

The Owners sought summary judgment in the Connecticut proceedings in respect, among other things, of their claims for unjust enrichment and quantum meruit. The Bank sought declaratory relief from the tribunal, as well as an anti-suit injunction.

Fifth Award

The tribunal found that the counterclaims for reasonable remuneration and quantum meruit were counterclaims arising out of or in connection with the switch bill. Therefore, the tribunal granted the anti-suit injunction and declared that the counterclaims had been dismissed by the Fourth Award.

The Owners appealed, arguing that the tribunal had no jurisdiction in respect of these counterclaims because they did not come within the scope of the arbitration agreement. They also contended that the tribunal, in the First Award, had already decided that these counterclaims were not arbitrable because they fell outside the ambit of the arbitration agreement (although neither party had ever addressed the tribunal on the issue).

The Commercial Court decision

The Court agreed with the tribunal (as it found in its Fifth Award) that the First Award did not decide whether the reasonable remuneration and quantum meruit counterclaims came within the ambit of the arbitration agreement. This was a non-point in that the tribunal was not asked to deal with it and had it done so, this would arguably have been a procedural error susceptible to challenge. There was, therefore, no issue estoppel in respect of these claims.

As to the judge’s order, this declared that the tribunal had jurisdiction over “the Claimant’s counterclaims in the arbitration arising out of or in connection with the contract contained in or evidenced by the Bill of Lading.” The wording was inclusive and, as the tribunal had found, there was nothing on the face of the order to indicate that the counterclaims for reasonable remuneration and quantum meruit were excluded.

The Court concluded that the judge had only decided the arbitrability issue and had left open the question of which particular counterclaims fell within the scope of the arbitration agreement. It agreed with the tribunal that the counterclaims in question fell within the ambit of the “arising out of or in connection with” wording.

The Court referred to the presumption of one-stop arbitration, namely that in construing an arbitration clause, it should be presumed that the parties intended any dispute arising out of their relationship to be decided by the same tribunal, unless the language they used clearly indicated otherwise. There was nothing in the wording of the arbitration agreement in this case to displace that presumption.
Further, a dispute as to whether or not the Bank as the switch bill holder owed the Owners money for use of the vessel and storage charges whilst the Owners acted as carrier of the cargo was self-evidently a dispute arising out of or in connection with the switch bill contract.

The Court, therefore, dismissed the challenge to the tribunal’s jurisdiction.

Comment

In an earlier related decision in 2020, the Court dismissed the Owners’ attempts to argue that the switch bill contained an implied term that the Bank and/or the cargo receivers would: (i) take all necessary steps to enable the cargo to be discharged and delivered within a reasonable time; and/or (ii) discharge the cargo within a reasonable time. The reasonable remuneration/quantum meruit counterclaims were effectively the same as those which failed for damages and/or breach of an implied term.
Master acquitted of charges relating to seamanship and use of vessel
Master acquitted of charges relating to seamanship and use of vessel

The master of a vessel was recently acquitted after a trial at Inverness Sheriff Court in respect of charges arising out of three alleged incidents which took place in Scottish waters and which involved two other vessels and a swimmer in the water. The master was accused among other things of exhibiting poor seamanship and breaching international maritime regulations.

The jury found the master not guilty of these charges in just over an hour.

The background facts

Mr Steven Davie was employed at the relevant time by Seaprobe Atlantis Ltd as the master of the UK registered vessel, Spirit of Adventure. The incidents in question took place on 13 August 2018 in the waters around Eilean Donan Castle by the Isle of Skye in Scotland. On that day, Mr Davie had initially taken passengers on a sightseeing and wildlife tour past the Castle and was subsequently returning with passengers on a fishing trip.

Mr Ross Edgley was undertaking a round-Britain swimming expedition and on that day, he was headed for the Castle so that members of the media accompanying him could take photographs of him receiving a world record. A twin-hulled sailing vessel, Hecate, had been chartered to provide him with a place to sleep, rest and eat when not in the water. It was skippered by Mr Andrew Knight. A second boat, Brightwater, was chartered to assist and to carry additional members of the press. It was skippered by Mr Hugh Balfour-Paul.

A number of complaints were subsequently made against Mr Davie and Spirit of Adventure in respect of three incidents. In essence, Mr Davie was accused of driving his vessel at excessive speed in the vicinity of the other vessels, passing between the Hecate and the Brightwater and the shore where there was insufficient sea-room and depth of water to do so safely and creating a disturbance.

Further, Mr Davie was said to have driven at excessive speed given the proximity to other ships and to the shore, the depth of the water and while there were persons in the water. He was also accused of having failed to take action in ample time and with due regard to the observance of good seamanship to avoid a collision because he passed the other ships at an unsafe distance, he failed to allow the other ships sufficient sea-room and he failed to alter his course to avoid a collision.

Mr Davie’s alleged actions in relation to these three incidents were said to amount to breaches of the Convention on the International Regulations for Preventing Collisions at Sea 1972 (“COLREGS”) as well as the Merchant Shipping Act 1995. The COLREGS are a nautical “highway code.”

The witness evidence

As to the first incident, Mr Knight stated that the Spirit of Adventure came very close, approximately 10 metres or less, and at an unreasonably high speed in excess of six knots, while Mr Edgley was being photographed with the Castle as the backdrop. Mr and Mrs Balfour-Paul’s evidence was to the effect that the Spirit of Adventure came between the Hecate (which was allegedly anchored at the jetty) and the Castle, did “a 180” and came back up on the port side of the Brightwater doing around 12 knots, further that while Mr Edgley was receiving his award, the Spirit of Adventure approached, throttled up and caused the Hecate to rise out of the water, creating large waves that caused the filming to stop.

As to the second incident, later the same day, when the Hecate was returning Mr Edgley to the water, Mr Knight testified that Spirit of Adventure approached at speed, but then altered course and maintained a high speed which increased a risk of collision. Mr Knight indicated that Mr Davie was allegedly moving his course to starboard steadily, which supposedly increased the risk of collision. He thought that the Brightwater was approximately 40 metres behind the Hecate. Mr Balfour-Paul stated that the Spirit of Adventure came straight at the Brightwater and across her stern.
As to the third incident, after this supposed “near miss”, according to Mr Knight the *Spirit of Adventure* took off and re-appeared 40 minutes to one hour later. The *Hecate* proceeded to the point where the swim was to be continued. *Spirit of Adventure* was then alleged to have approached at high speed as demonstrated by a significant bow wave and large wash and maintained a course passing 20 metres from the paddle boarder and then 40 metres from the *Hecate* and Mr Edgley. Mr Davie was said to have backed his engine as he arrived parallel with the *Hecate*, displacing water and causing more of a significant wake.

**Expert evidence**

The opponents’ expert made various criticisms of Mr Davies’ actions, including that he:

i. Failed to operate at a safe speed in proximity to other vessels;

ii. Failed to take action to avoid a collision with good seamanship;

iii. Failed to alter course in a way that was large enough and readily apparent;

iv. Failed to give sufficient sea room to avoid a close-quarters situation;

v. Impeded the passage of the other vessels and restricted their ability to manoeuvre;

vi. Repeatedly passed close to the other vessels increasing the risk of collision and showing poor seamanship; and

vii. Navigated at speed in shallow water.

Significantly, Mr Davie’s expert found that the evidence of Mr Knight and Mr Balfour-Paul was highly contradictory. He also found all of the opposing expert’s criticisms to be unfounded.

Among other points made by Mr Davie’s expert was that, according to photographic evidence, no flag had been flown by the *Hecate* when Mr Edgley was in the water to indicate that a swimmer was in the water and that any vessel in the vicinity should keep well clear at low speed. This was contrary to the International Code of Signals.

In addition, when the *Hecate* was engaged in her role as a support craft for Mr Edgley, she was restricted in her ability to manoeuvre and so was required by Rule 27 of the COLREGS to display the appropriate lights and shapes or provide an alternative signal. Again, photographic and video evidence showed this was not done.

Mr Davie’s expert also stated that there should have been a local Notice to Mariners in respect of such an open water swimming event that included a caution to other loch users and warned other vessels to keep well clear at slow speed. The *Hecate* should also have updated the local authorities with Mr Edgley’s planned movements.

No such precautions appeared to have been taken.

On the evidence, the expert did not believe that the *Hecate* had indeed been anchored near the Castle but if this was in fact the case, then he thought that Mr Knight failed to comply with the COLREGS. If the vessel was not anchored and was in fact underway, then Mr Knight could not have been monitoring the helm, as he alleged.

Mr Davie’s expert found that the risk of collision had not been demonstrated by the evidence. However, had there been such a risk then there was evidence that the COLREGS relating to the determination of the risk of collision were not properly applied by Mr Knight and Mr Balfour-Paul. Indeed, their actions in the event that such a risk existed were contrary to the actions required of a give-way vessel (*Spirit of Adventure* being the stand-on vessel in this case).

**The outcome**

The jury accepted the evidence of Mr Davie’s expert and acquitted Mr Davie of these charges.
Comment

Prior to these incidents, Mr Davie had made more than 300 trips up and down this stretch of coast in his role as skipper of the Spirit of Adventure, which operated as a sea angling charter but was also used to take passengers on sightseeing tours and transfers. Mr Davie was, therefore, very familiar with these waters and very experienced.

As a result of the video, photographic, and internet evidence, as well as the comprehensive expert evidence, Mr Davie was found to have been innocent of all charges of poor seamanship and breaches of international maritime regulations.

The authors of this article represented Mr Davie.
Ince is a trading name of Ince Gordon Dadds LLP, a limited liability partnership registered in England & Wales (registered number: OC383616) authorised and regulated by the Solicitors Regulation Authority (SRA number: 596729). A list of members of the LLP, and of those non-members designated as partners, is displayed at our registered office: Aldgate Tower, 2 Leman Street, London, E1 8QN. The term ‘partner’ used in relation to the LLP, refers to a member of the LLP or an employee or consultant of the LLP or any affiliated firm of equivalent standing. Ince Gordon Dadds LLP is a subsidiary of Gordon Dadds Group plc.

You, your key contacts & Ince

LONDON
Michael Volikas, Partner
Michael.Volikas@incegd.com
+44 (0) 20 7481 0010

HAMBURG
Jan Hungar, Partner
Jan.hungar@incegermany.com
+49 (0) 40 380 860

PIRAEUS
Jamila Khan, Partner
Jamila.Khan@incegd.com
+30 210 455 1000

DUBAI
Mohamed El Hawawy, Partner
Mohamed.ElHawawy@incegd.com
+971 4 307 6000

LIMASSOL
George Zambartas, Partner
George.Zambartas@incegd.com
+357 2209 0102

SINGAPORE
Wai Yue Loh, Partner
Wai.Yue.Loh@incegd.com
+86 10 5706 9581

BEIJING
Wai Yue Loh, Partner
Wai.Yue.Loh@incegd.com
+86 (0) 10 5706 9588

SHANGHAI
Paul Ho, Partner
Paul.Ho@incegd.com
+86 (0) 21 6157 1212

HONG KONG
David Beaves, Partner
David.Beaves@incegd.com
+852 2877 3221

GIBRALTAR
Anne Rose, Head of Shipping
Anne.Rose@incegd.com
+350 200 68450

24 Hour International Emergency Response Tel: + 44 (0)20 7283 6999
LEGAL ADVICE TO BUSINESSES GLOBALLY FOR OVER 150 YEARS.
incegd.com